STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 6, 2005
v	No. 254241 Wayne Circuit Court
TMANDO ALLEN DENSON, Defendant-Appellant.	LC No. 02-015004-01

Before: Saad, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Defendant pleaded nolo contendere to carrying a concealed weapon, MCL 750.227, possession of a firearm by a felon, MCL 750.224f, and manufacturing marijuana, MCL 333. 7401(2)(d)(iii). The court sentenced defendant to concurrent prison terms of five months to five years on the weapons charges and five months to four years on the marijuana charge. He appeals by leave granted and we affirm.[1]

Defendant moved to withdraw his plea on the basis that it was involuntary and that there was newly discovered evidence. The trial court properly denied the motion.

Defendant claims that the trial court abused its discretion in denying the motion to withdraw his plea, that trial counsel was ineffective for failing to interview and call witnesses for trial, and that the evidence was insufficient to support a conviction.

This Court reviews the lower court's decision to deny a motion to withdraw a plea after sentence has been imposed for an abuse of discretion which results in a miscarriage of justice. *People v Davidovich,*, 238 Mich App 422, 425; 606 NW2d 387 (1999); MCR 6.311. An abuse of discretion exists when the result is so grossly and palpably violative of fact and logic that it evidences a perversity of will or a defiance of judgment. *People v Hine,* 467 Mich 242, 250; 650 NW2d 659 (2002).

Defendant claims that he is innocent of the offenses and only pleaded nolo contendere because the court coerced him into accepting the plea bargain and, therefore, the plea was

[1] This appeal is being decided without oral argument pursuant to MCR 7.214(E).

involuntary. Defendant offers nothing to support his claim of innocence except his bald statement that he maintained his innocence up until the time of his nolo contendere plea. In his brief, defendant recites facts from the search warrant and the police report, both of which were not part of the lower court record. In any event, the recitation, including defendant's confession to the police that he was wearing a bulletproof vest, points to his guilt. The only fact made part of the record was the investigator's report used for the factual basis of the plea. The prosecutor read into the record that a search warrant had been executed at an address in Detroit where defendant was found to be in possession of a handgun and marijuana and was wearing a bulletproof vest.

Defendant claims on appeal that he was under duress when he entered his plea. However, a review of the record does not support that conclusion. The court advised defendant of the charges against him, the penalties he faced and the rights he was giving up by pleading no contest. The court complied with MCR 6.302 with regard to the taking of pleas. Defendant spoke freely about any number of issues and, in fact, acknowledged, on the record, that he was pleading freely and voluntarily.

To support his coercion claim, defendant relies on the trial court's statements about the jury being available to start trial. It appears that the court was merely ready for trial on the day agreed to by defendant at the pretrial almost two months before. Indeed, defendant indicated that he wanted to go to trial, so the jury's presence was not an issue. It appears that he did not perceive bringing in the jury and proceeding to trial as a threat to enter into a plea bargain. The court's protection of defendant's right to a jury trial cannot be said to be coercion to extract a plea. Defendant had a choice to go to trial with the jury or to plead nolo contendere. He voluntarily chose to plead nolo contendere.

Also, defendant says he was denied the effective assistance of counsel. In *People v Thew*, 201 Mich App 78, 89; 506 NW2d 547 (1993), this Court addressed a claim of ineffective assistance of counsel after the defendant pleaded guilty. The Court stated: "When reviewing a claim of ineffective assistance of counsel arising out of a guilty plea, a court must determine whether the defendant tendered the plea voluntarily and understandingly. The question is not whether, in retrospect, counsel's advice could be considered right or wrong, but whether it was within the range of competence demanded."

Because we find that defendant's plea was voluntary, we hold that he has waived this issue. However, even if the waiver did not exist, we find that defendant was not denied the effective assistance of counsel, because his claim lacks merit.

This Court normally reviews the findings of the trial court for clear error and then decides de novo whether those facts constitute a violation of defendant's constitutional right to the effective assistance of counsel. *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003); *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In this case, there was no hearing in the trial court pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). Therefore, this Court looks to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

Our Supreme Court, in *People v Pickens*, 446 Mich 298, 318; 521 NW2d 797 (1994), adopted the standard set forth in *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), which requires the defendant to prove

> that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment...[and] that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

The standard of counsel's performance is an objective one of reasonableness under prevailing professional norms. The prejudice suffered by the defendant must be such that there is a reasonable probability that, but for the error on the part of counsel, the outcome of the proceedings would have been different. There is a presumption that counsel is competent and the burden is on the defendant to overcome that presumption. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

Pretrial investigation of a case is a constitutional duty of defense counsel in order to insure that a defendant has effective assistance of counsel. *People v Dixon*, 263 Mich App 393, 397; 688 NW2d 308 (2004), citing *Mitchell v Mason*, 325 F3d 732, 743 (CA 6, 2003). Here, defendant claims that counsel's failure to interview people who were present at the time of his arrest, who could be offered as defense witnesses, deprived him of his right to the effective assistance of counsel. Defendant stated to the trial court that he had "two or three civilian witnesses, who were present at the execution of the search warrant." One was incarcerated with the Department of Corrections, and defendant did not know the addresses of the other witnesses.

It is unclear from this record whether defendant communicated the names of the witnesses to his attorney prior to the day of trial. What is clear is that defendant did speak with his attorney not only on the day of trial but before the preliminary examination when counsel was retained. It is also clear that defendant was not in jail until approximately two weeks before trial and, therefore, had access to his attorney and the witnesses. Yet, defendant apparently made no effort to bring the witnesses to the attention of his attorney or to locate them himself. As the trial court noted, trial counsel represented defendant on another case until that case went to trial and another attorney took over. Defendant's contact with his attorney should have resulted in generating a witness list, if witnesses were available.

Even if defendant made counsel aware of witnesses, the decision to call a particular witness is a matter of trial strategy and this Court will not substitute its judgment for that of counsel in a matter of trial strategy. Defendant must show that the failure to call the witnesses deprived him of a substantial defense which would have affected the outcome of the proceeding. *Dixon, supra; People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Here, there is no record as to how defendant's potential witnesses would have testified at trial. It is unlikely that any of them would have come to court and taken responsibility for the marijuana found by the police. Defendant has failed to show that a reasonable probability exists that the unknown testimony would have altered the outcome of the trial. Under the circumstances, defendant was not deprived of the effective assistance to counsel. *People v Avant*, 235 Mich App 499; 597 NW2d 864 (1999).

Finally, defendant claims that newly discovered evidence weakens the prosecutor's case to such a degree that this Court should allow him to withdraw his plea and grant him a trial. Defendant frames this argument as one of sufficiency of evidence. However, because defendant waived his right to a jury trial and pleaded nolo contendere, the issue is, instead, whether the trial court abused its discretion in denying his motion to withdraw his plea and proceed to trial on the basis of newly discovered evidence.

Our Supreme Court in *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003), held that the standard of review on a motion for a new trial on the basis of newly discovered evidence is limited to a determination of whether the trial court abused its discretion. The factors to be considered are (1) whether the evidence is newly discovered, (2) whether the evidence is not merely cumulative, (3) whether the party, using reasonable diligence, could not have discovered and produced the evidence at trial, and (4) whether the new evidence makes a different result probable at trial . Additionally, the evidence cannot merely be used for impeachment purposes. Additionally, the evidence cannot merely be used for impeachment purposes. *People v Davis*, 199 Mich App 502, 516; 503 NW2d 457 (1993).

Here, the so-called evidence was immaterial or irrelevant to defendant's guilt or innocence. Therefore, the trial court properly exercised its discretion in refusing to allow defendant to withdraw his nolo plea.

Affirmed.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Jane E. Markey